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In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1946 - - - Number 1126

In the Matter of the Estate of
EDNA N. WEIL,
Deceased.

— — — — — — — — — — —

RALPH N. WEIL,
Petitioner,

vs.

H. F. HAESSLER HARDWARE CO.,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The written decision of the Circuit Court of Milwaukee County in the action of H. F. Haessler Hardware Co. versus Hercules Construction Company, Ralph N. Weil, et al, appears at page 142 of the Record and the Findings of Fact and Conclusions of Law in said Court appear at page 148 of the Record.

The original decision of the trial court of the County Court of Milwaukee County in Probate appears at page 107 of the Record, and the Findings of Fact and Conclusions of Law appear at page 111 of the Record.

The opinion of the Supreme Court of the State of Wisconsin is reported in Volume 249, Wisconsin Reports (Advance Sheet, page 385), 24 N. W. (2d) 662. (R. 195)

Page references are to the printed appendix served upon Respondent.

STATEMENT OF FACTS.

Hercules Construction Company was organized as a Wisconsin corporation on September 13, 1923, with a capital stock of $10,000.00. (R. 154) Stock to the amount of $5,000.00 was issued in exchange for certain assets on December 8, 1923. (R. 154, 155) Said company was insolvent at all times from 1924 until the time of the appointment of the receiver in 1929. (R. 157) Ralph N. Weil was a director and President of said corporation at the times in question (R. 157) "Ralph N. Weil managed the affairs of the company much as though the business was his own." (R. 165)

H. F. Haessler Hardware Co. commenced proceedings in the Circuit Court of Milwaukee County on September 19, 1929, against Hercules Construction Company for the sequestration of its assets and for the appointment of a receiver. (R. 111) On October 9, 1929 the Circuit Court of Milwaukee County appointed Frank H. Nelson receiver and he duly qualified and proceeded to liquidate the assets of the Hercules Construction Company.

Creditors filed claims allowed at $26051.18. (R. 152, 153, 167) After payment of taxes and necessary expenses of administration no funds were left with which to pay any dividends to the creditors. (R. 154) H. F. Haessler Hard-

ware Company served an amended and supplemental complaint and order to show cause why Ralph N. Weil and other officers of the Hercules Construction Company should not be interpleaded as party defendants in said Circuit Court action. (R. 124) The Circuit Court ordered said Ralph N. Weil and other officers interpleaded March 30, 1931. Ralph N. Weil filed an answer in said action. (R. 139) The action was tried before the Circuit Court of Milwaukee County, without a jury, in January, 1933. Said Circuit Court made findings of fact and conclusions of law on March 13, 1933. (R. 148)

For the purpose of convenience, we quote the following Findings, which are material to the matter in controversy:

DORILTON ARMS COMPANY.

"36. That on or about the 19th day of March, 1925 the Hercules Construction Company entered into a certain financing agreement with one Arthur J. Straus Company, wherein and whereby the said Arthur J. Straus Company agreed to finance the erection of a certain apartment building at 374 Royal Place, Milwaukee, Wisconsin.

"37. That thereafter the said defendants, Ralph N. Weil and Alex Weil, on or about the 31st day of March 1925, caused to be organized the Dorilton Arms Company as a Wisconsin corporation and purported to assign the aforesaid financing agreement to said Dorilton Arms Company.

"38. That the defendants, Ralph N. Weil and Alex Weil, held a controlling interest in the stock of said Dorilton Arms Company. Ralph N. Weil was President and Alex Weil was Vice-President.

"39. That on or about the 3rd day of June, 1925, a contract in writing was entered into between Hercules Construction Company and Dorilton Arms Company wherein and whereby the Hercules Construction Company agreed to erect said apartment building according to the plans and specifications for the sum of $127,000.00. That thereafter the Hercules Construction Company erected said apartment building and complied with all the terms of said contract on its part to be performed.

"40. That the Dorilton Arms Company made various payments to the Hercules Construction Company required under the terms of said contract, except a certain payment of Sixteen Thousand Eight Hundred Dollars ($16,800.00). That on or about the 31st day of December, 1926 the aforesaid directors of the Hercules Construction Company made an alleged allowance of $16,800.00 to the Dorilton Arms Company.

"41. The record shows that Ralph N. Weil and Alex Weil were stockholders, directors and officers of both companies. In this situation the duty devolved on these men to show clearly the utmost good faith to the Hercules Construction Company while representing it and the Dorilton Arms Company. The record also shows that the copy of the original contract, which was filed with the Railroad Commission for the purpose of obtaining a permit to float a bond issue was signed so as to withhold from it information that they were acting in a dual capacity. Likewise it appears that the Hercules Construction Company had a very advantageous contract and the defendants had no right to surrender or give away without some consideration, $16,800.00 which belonged to the Hercules Construction Company. This, however, was done by simply crediting this amount to the Dorilton Arms Company. The

evidence fully warrants a finding of bad faith on the part of Alex Weil and Ralph N. Weil in waiving for the Hercules Construction Company the sum mentioned and thereby dissipating its assets to that extent and thereby enriching the other company in which they were interested.

"42. That the aforesaid Alex Weil and Ralph N. Weil, directors of the Hercules Construction Company, made said allowance fraudulently and without a fair consideration and with intent to hinder, delay and defraud the creditor of the said Hercules Construction Company. That said directors disposed of a debt due the Hercules Construction Company without consideration thereby misappropriating the assets of the Hercules Construction Company for the benefit of themselves.

"43. That the plaintiff is entitled to recover for the benefit of the creditors, whose claims have been filed and allowed the sum of $16,800.00 together with interest thereon from the 18th day of March, 1931 from the said defendants, Alex Weil and Ralph N. Weil." (R. 112, 161)

EXCESSIVE SALARIES OF RALPH N. WEIL.

"44. That on or about the 10th day of January, 1925, the then directors consisting of the defendants, Alex Weil, Ralph N. Weil and Esther S. Weil, held an alleged directors' meeting at which it was resolved to pay the defendant, Ralph N. Weil, a salary of $6000.00 per year. That thereafter on June 14, 1925, at a purported meeting of the Board of Directors it was resolved to pay the said defendant, Ralph N. Weil, the further sum of $5000.00.

"45. That at a purported meeting of the board of directors consisting of the defendants, Alex Weil, Ralph N. Weil, Esther S. Weil and Agnes M. Washie Schmidt, held January 12, 1926, it was resolved to pay the defendant,

Ralph N. Weil, the sum of Ten Thousand Dollars ($10,000.00) per year as and for salary during the year 1926.

"46. That the aforesaid directors of said Hercules Construction Company never held any actual meetings but permitted the said Ralph N. Weil to conduct the affairs of said Hercules Construction Company without any supervision. That Ralph N. Weil managed the affairs of the company much as though the business was his own. That the directors permitted the said Ralph N. Weil to withdraw from the funds of said corporation during the years 1925 to 1929 sums in excess of $40,000.00. alleged to have been paid for salaries of Ralph N. Weil. The records of the company with its ultimate insolvency showed the mismanagement of its affairs by its directors and particularly by Ralph N. Weil. The facts referred to above were only a few of the instances where the assets of the company were dissipated. The evidence clearly shows that a salary of $10,000.00 per year was much in excess of the value of the services rendered by Ralph N. Weil. The payment of that part of his salary which was excessive constituted a diversion of the assets of the company to the extent of such excess from the funds to which creditors of the company had a right to look for the payment of their claims.

"47. The evidence shows that up to January, 1926, Ralph N. Weil drew a salary of at least $5000.00 per year and on January 12, 1926, the Board of Directors voted to increase this salary to $10,000.00 per year, although the books of the company showed a deficit of $5836.68 for the year 1925. The books further showed a deficit at the end of 1926 amounting to $3899.56; at the end of 1927 $4941.17; and at the end of 1928 $1030.76. During 1929 the company operated only about one half of the year when it ceased doing business and finally made an assignment for

the benefit of its creditors. For this year the account books of the company were not closed and so the record fails to show its net losses. This record shows indisputably that the salary drawn by Ralph N. Weil was excessive and beyond what his services were reasonably worth. Considering the past record it is reasonable to assume that the losses during 1929 continued as before and that the continued payment of a salary at the rate of $10,000.00 per year to Ralph N. Weil was excessive.

"48. While the salary of $5000.00 per year in the light of the company's losses seems to have been excessive it at least appears reasonable to hold that Ralph N. Weil's salary was excessive to the extent that it created a loss for the company as indicated by the above figures of deficits. Having this in mind, my conclusion is that Ralph N. Weil drew at least $10,000.00 in salaries in excess of what the directors and officers were reasonably justified in paying him for his services.

"49. That the said sums were withdrawn by said Ralph N. Weil without a fair consideration with intent to hinder, delay and defraud the creditors of said Hercules Construction Company.

"50. That the plaintiff is entitled to recover of the defendant, Ralph N. Weil the sum of Ten Thousand Dollars ($10,000.00) for the benefit of the creditors whose claims have been filed and allowed herein." (R. 112, 164)

No objection was ever made to the form or substance of said Findings by the petitioner. Judgment was entered in favor of H. F. Haessler Hardware Co. on March 23, 1933. No appeal was taken from the judgment.

Ralph N. Weil was adjudicated a bankrupt February 19, 1934. (R. 122) On August 10, 1934, Frank H. Nelson

was discharged as receiver. (R. 184) Petitioner Ralph N. Weil became a non-resident of the State of Wisconsin. Edna N. Weil, the mother of Ralph N. Weil, died May 1, 1945, leaving her surviving as her only heir-at-law, the said Ralph N. Weil. Proceedings were commenced in the County Court of Milwaukee County for the administration of her estate. (R. 107)

H. F. Haessler Hardware Company on August 23, 1945 filed a petition in the County Court of Milwaukee County praying that it be allowed and permitted to intervene in the proceedings in respect of the Estate of Edna N. Weil, deceased, pursuant to the provisions of the Wisconsin Statutes, Section 318.08, and on August 23, 1945 an order was entered granting leave and permission to intervene in said Estate. (R. 101)

The County Court adjudged that there was due from said Ralph N. Weil to H. F. Haessler Hardware Co. the sum of $30,560.93, with interest, upon the judgments entered in the Circuit Court of Milwaukee County. That Ralph N. Weil was not discharged in bankruptcy from said judgments, that H. F. Haessler Hardware Co. is the proper party to institute the proceedings, and that the distributive share or interest of said Ralph N. Weil in the Estate of Edna N. Weil be paid to the Clerk of the Circuit Court of Milwaukee County for distribution by said Court pursuant to the order of said Court, dated August 20, 1934. (R. 118) This judgment of the County Court of Milwaukee County was affirmed by the Supreme Court of the State of Wisconsin. (R. 195)

QUESTIONS PRESENTED.

(1) Whether a judgment against an officer of a corporation for misappropriation of corporate assets is excepted from a discharge in bankruptcy?

(2) Whether a judgment against an officer of a corporation for misappropriation of corporate assets under the guise of salaries is excepted from a discharge in bankruptcy?

Argument.

(1) The Findings of Fact, Conclusions of Law and Judgment of the Circuit Court of Milwaukee County Are Res Judicata.

It should be noted that no appeal was taken from the judgment of the Circuit Court of Milwaukee County. The Supreme Court of Wisconsin in its decision held "As no appeal was taken from the Circuit Court judgment to that effect, all provisions therein and in the Findings and Conclusions, upon which it is based are res adjudicata, and therefore conclusive and binding between appellant and all parties to the litigation." (R. 198)

Union & Planters' Bank vs. Memphis, 189 U. S. 71, 47 L. Ed. 713, 23 S. Ct. 604, 606:

> "What effect a judgment of a state court shall have as res judicata is a question of state or local law."

Mitchell vs. First National Bank of Chicago, 180 U. S. 471, 480; 45 L. Ed. 627, 21 S. Ct. 418, 421:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the

same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Johnson Steel Street Rail Co. vs. Wharton, 152 U. S. 252, 14 S. Ct. 608, 609:

"The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction, as to parties and subject-matter, shall not be retried between the same parties, in any subsequent suit in any court * * *" (page 611) "The final judgment of a court (at least, one of superior jurisdiction) competent, under the law of its creation, to deal with the parties and the subject-matter and having acquired jurisdiction of the parties, concludes those parties and their privies in respect to every matter put in issue by the pleadings and determined by such court."

Case vs. Beauregard, 101 U. S. 688, 25 L. Ed. 1004, 1005:

"Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided it would still be res judicata, a bar to the complainant, a protection to the defendants."

Cromwell vs. Sac County, 94 U. S. 351, 24 L. Ed. 195.

See also:

Heiser vs. Woodruff, 66 S. Ct. 853, decided April 22, 1946 in which many of the authorities are cited.

(2) Federal Statute Involved.

Section 17 (11 U. S. C. 35) "*Debts not affected by a discharge:*

"(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts whether allowable in full or in part except such as

(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity • • • "

(3) The Term "Misappropriation" in the Above Section Should Be Read in its Natural and Ordinary Sense.

Miller vs. Robertson, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265:

"The words of a statute are to be read in their natural and ordinary sense giving them a meaning to their full extent and capacity unless some strong reason to the contrary appears."

What is the meaning of "misappropriation" in its natural and ordinary sense? "Misappropriation" is merely "appropriation to wrong uses" *(Oxford New English Dictionary,* Vol. vi. 1908); To "misappropriate" means "to appropriate wrongly or misapply in use, especially wrongfully and for one's self"; *(Webster's New International Dictionary,* 2nd Ed. 1937); "to appropriate improperly as public funds; devote to a purpose not intended or wrong; misapply"; *(Funk & Wagnall's New Standard Dictionary,* 1935).

Bannon vs. Knauss, 13 N. E. (2nd) 733 (57 Ohio App. 288):

> 'Misappropriation is defined in 40 *Corpus Juris* 1213, as 'The act of misappropriating or turning to a wrong purpose; wrong appropriation; a term which does not necessarily mean peculation although it may mean that.'
>
> "As used in the bankruptcy law, misappropriation is not restricted to criminal conduct."

(4) The Term "Misappropriation" Was Not Added to the Bankruptcy Statutes Until 1898.

The petitioner argues that in order to have the "misappropriation" of which Section 17(4) speaks there must be a showing of moral turpitude or bad faith equivalent to criminal conduct. Or in other words it would have to be a criminal misappropriation. But in that case, why would Congress write in the word "misappropriation" at all, if it added nothing?

The 1867 statute (Section 33, Rev. Stat. 5117; 14 Stat. at L. 533, Chap. 176) excepted from discharge any debt created by, among other things, "the fraud or embezzlement of the bankrupt" but the word "misappropriation" did not occur in the 1867 or any prior statute. Neither was "misappropriation" mentioned in the 1898 Act, as passed and sent to conference prior to enactment. At that time, Section 16 of the bill (now Section 17(4)) read "were created by his fraud, embezzlement, or defalcation while acting as an officer or serving in any fiduciary capacity." (Cong. R. 55th Cong. 2nd Sess., February 16, 1898, p. 1780) The word "misappropriation" was added in conference. It occurs in the bill for the first time in its final form, as returned to the House and Senate by the conferees; and the report made to the House by the Committee of Con-

ference says of the revised discharge provisions (Cong. R. 55th Cong. 2nd Sess., June 28, 1898, p. 6428) that "Discharges from debts created by wrongs, frauds, etc. can not be granted."

The petitioner's argument offers no rational explanation why the conferees and the Congress should have added the word "misappropriation", if it was intended by them that "misappropriation" and "embezzlement" should be construed as synonyms. Manifestly, in adding the word "misappropriation" to the words already there, Congress intended to add to the categories of misconduct which would bar discharge the further and more inclusive category of misconduct comprised in "misappropriation."

The case of *Neal vs. Clark*, 95 U. S. 704, 24 L. Ed. 586, cited six times in petitioner's brief was decided in 1878 under the Act of 1867, long before the term "misappropriation" was added to the Bankruptcy Act. It does not involve the question of "misappropriation" by an officer of a corporation and has no application to the facts of this case.

It should also be noted that in its original form in 1898 Section 17 excepted from release in Bankruptcy "provable debts which were * * * (2) judgments in actions for frauds or obtaining property by false pretenses or false representations. * * * " "Clause (2) was changed in 1903 to 'liabilities for obtaining property by false pretenses or false representations * * *'".

In the case of *Crawford vs. Burke*, 195 U. S. 176, 25 S. Ct. 9, 12, it is said:

> "That a change in phraseology creates a presumption of a change in intent."

In *Central Hanover Bank & Trust Co. vs. Herbst*, 93 Fed. (2d) 510, the court said:

"We must give the words different meanings so far as we can * * * "

Davis vs. Aetna Acceptance Co., 293 U. S. 328, 55 S. Ct. 151, 79 L. Ed. 393 does not involve misappropriation by an officer of a corporation.

Petitioner cites no applicable decision of the Supreme Court which conflicts with the decision of the Supreme Court of the State of Wisconsin.

(5) A Discharge in Bankruptcy Does Not Release the Bankrupt From Liability on a Debt Created by His Fraud, Embezzlement, Misappropriation, or Defalcation While Acting as an Officer or in Any Fiduciary Capacity.

Savin vs. McNeill, 244 Wis. 552, 563; 13 N. W. (2d) 82 (1944):

"The claim of the receiver in this case is based upon embezzlement, fraudulent misappropriation, and defalcation while acting as an officer of this corporation. The receiver is not suing on the contract for rent but for assets of the corporation converted by defendant. This liability is excepted from the release by Sec. 17 of the Bankruptcy Act."

In re Bernard, 87 Fed. (2d) 705, 707 (1937):

"A director and president knowing a corporation to be insolvent has appropriated part of its assets to liquidate his own claims and those of his son, who was another officer. It was his duty not to use his position as a fiduciary for his own benefit and also not to co-operate with his son, another fiduciary, to benefit the latter at the expense of the creditors. Therefore he has not only acted in violation of Section 15 of the stock corporation law but contrary to his fiduciary obligations at common law."

Held the liability arising from a "misappropriation" by an officer of a corporation was not discharged.

This authority is contrary to petitioner's theory that there must be a loss of a defined asset of the corporation. There was no loss to the corporation as the assets were used to pay a corporate debt.

In re Hammond, 98 Fed. (2d) 703 (1938), C. C. A. N. Y. writ of certiorari denied, 59 S. C. R. 149:

Accoustics obtained an offer from Reynolds and Company of a one-third participation in the purchase of 600,000 shares of DeForest Stock. The directors voted to accept the offer. When time came for payment, the company lacked funds, and some of the directors took the contract in their own names and made large profits in the sale of stock.

> "This court imposed liability on the directors Biddle, Deutsch and Hammond upon the principle that a fiduciary may make no profit for himself out of a violation of duty to his cestui even though he risk his own funds in the venture, that the rigid rule of 'undivided loyalty' forbids directors of a solvent corporation to take over for their own profit a corporate contract on the plea of the corporation's finanial inability to perform • • •
>
> As the interlocutory decree adjudged the conduct of Hammond and his associates was an 'unlawful taking and disposition' of Accoustics' property and property rights, whether the property so taken be deemed the corporate contract or the stock covered by the contract or the proceeds of the sale of such stock it was a res held in trust for the corporation by a person who was already a fiduciary; for the fiduciary to claim it as his own was a 'misappropriation' within the ordinary meaning of that word."

In the *Hammond* case contention was made that some evil intent must accompany the bankrupt's misappropriation.

The court said:

> "But this assumption is unwarranted; he is chargeable with knowledge of the law. The character of the liability imposed upon a fiduciary for appropriating property of his cestui in violation of his duty is the same whether he has actual knowledge that the law imposes the duty or is merely charged with such knowledge. In either event the appropriation is intentional and, since it is unlawful, it is such a 'misappropriation' as, in our opinion, excepts the liability from release by a discharge in bankruptcy."

In re Graaf, 22 Fed. (2d) 163 (Mich. 1927);

In Re Metz, 6 Fed. (2d) 962. (An extensive quotation from this case is in the opinion of the Supreme Court of Wisconsin) (R. 204);

Bannon vs. Knauss, 13 N. E. (2d) 733, 57 Ohio App. 288 (1937);

Tatum vs. Leigh, 136 Ga. 791, 72 S. E. 236 (1911).

Banks vs. Corning Bank & Trust Co., 68 S. W. (2d) 452, 188 Ark. 841 (1934). Writ of certiorari denied 54 S. Ct. 863, 292 U. S. 653, 78 L. Ed. 1502. Dividends were voted when a company was insolvent and had no earnings out of which to pay a dividend.

Held that this was fraud and misappropriation of funds which was not discharged in bankruptcy.

8 *Corpus Juris Secundum* 578a, page 1540

> "Debts created by one acting as an officer or in a fiduciary capacity by fraud, embezzlement, mis-

appropriation or defalcation survive a discharge in bankruptcy."

Sec. 3587, *Remington on Bankruptcy*, 5th Ed.

(6) The Judgments Were Not Discharged:

(a) because they were debts created by fraud, embezzlement, misappropriation or defalcation while Ralph N. Weil was acting as an officer.

Dorilton Arms Company:

It is admitted that Ralph N. Weil was an officer of the corporation and his debt on the judgment is admitted. The question that remains is "was the debt created by fraud or misappropriation"?

Petitioner belabors the theory that there must be a loss of a defined asset to the corporation, but is unable to cite any authority for his contention. The Bankruptcy Act requires only that there be a "misappropriation."

Petitioner also argues that it is proper to go behind the formal findings and judgment to determine the facts upon which liability is predicated. But there are no facts in the record other than the formal findings of fact and conclusions of law. The Supreme Court of Wisconsin in its opinion said "there does not appear to be anything which would warrant holding that there was any other basis in the record for the adjudged indebtedness than the matter stated in the Court's findings and conclusions, upon which it based its adjudication as to the amounts and nature of appellant's liability for that indebtedness. (R. 201)

The Dorilton Arms Company owed the Hercules Construction Company $16800.00. Ralph N. Weil and Alex Weil, his father, were stockholders, officers and directors of both companies. Ralph N. Weil and Alex Weil held

a controlling interest in the Dorilton Arms Company. On December 31, 1926, this indebtedness was cancelled on the books of the Hercules Construction Company without any consideration. The Circuit Court found "The evidence fully warrants a finding of bad faith on the part of Alex Weil and Ralph N. Weil in waiving for the Hercules Construction Company the sum mentioned and thereby dissipating its assets to that extent, and thereby enriching the other company in which they were interested.

"That the aforesaid Alex Weil and Ralph N. Weil, directors of the Hercules Construction Company made said allowance fraudulently and without a fair consideration and with intent to hinder, delay and defraud the creditors of the said Hercules Construction Company. That said directors displosed of a debt due the Hercules Construction Company without consideration thereby misappropriating the assets of the Hercules Construction Company for the benefit of themselves." (R. 163)

Petitioner contends that this was a mere bookkeeping entry. However, the fact is that when this entry was made the sum of $16,800 disappeared as an asset from the books of the Hercules Construction Company and the liabilities were correspondingly increased and of course the losses also increased. It should be remembered that this was a one-man concern run by Ralph N. Weil. (R. 165) That Mr. Weil knew exactly what he was doing. The cancellation of the indebtedness of Dorilton Arms Company increased the value of Weil's stock in Dorilton Arms Company. Mr. Weil evidently anticipated that the cancellation of the indebtedness would never be discovered.

Respondent commenced suit for this misappropriation about March 24, 1931. (R. 124) Ralph N. Weil signed an answer under oath denying that there was any misappropriation. (R. 139) Mr. Weil, who with his father, con-

trolled the Dorilton Arms Company, instead of co-operating with the respondent so as to recover this asset for the Hercules Construction Company, denied that there was any misappropriation. The Findings of Fact were made on March 13, 1933. (R. 170)

The creditors pursued the officers who had misappropriated the assets and the Circuit Court of Milwaukee County found that they had a right to do so. The creditors were not obliged to sue the Dorilton Arms Company, another corporation controlled by the Weils and take a chance of collecting from that company.

When the allowance of $16,800.00 was made, the decisive step was taken. The die was cast, the misappropriation occurred. Whether there could or could not be a recovery from anybody else is immaterial. Under the circumstances the Circuit Court of Milwaukee County found and was entitled to find that there was a misappropriation of the assets of Hercules Construction Company.

Petitioner contends that no asset was misappropriated in this case. Finding 42 held "That said directors disposed of a debt due the Hercules Construction Company without consideration thereby misappropriating the assets of the Hercules Construction Company for the benefit of themselves." (R. 163)

The debt of Dorilton Arms Company to Hercules Construction Company was an asset. The Circuit Court found that this asset was misappropriated. The findings of the Circuit Court are conclusively binding and res judicata and cannot be attacked in this action.

The Court found that Ralph N. Weil was guilty of bad faith in this transaction and this is a finding of the existence of moral turpitude.

Excessive Salaries:

Hercules Construction Company was organized with a capital stock of $10,000.00.(R. 154) Only $5000.00 of stock was issued in exchange for certain assets on Dec. 8, 1923. (R. 155) The company was insolvent at all times from 1924 until the time of the appointment of the receiver in 1929. (R. 157) The Circuit Court found from 1925 to 1929 sums in excess of $40,000.00 were withdrawn by Ralph N. Weil for salaries. (R. 165) The Circuit Court found "The records of the company with its ultimate insolvency showed the mismanagement of its affairs by its directors and particularly by Ralph N. Weil. The facts referred to above were only a few of the instances where the assets of the company were dissipated. The evidence clearly shows that a salary of $10,000.00 per year was much in excess of the value of the services rendered by Ralph N. Weil. The payment of that part of his salary which was excessive constituted a diversion of the assets of the company to the extent of such excess from the funds to which creditors of the company had a right to look for the payment of their claims. (R. 165) * * *

48. While the salary of $5000.00 per year in the light of the company's losses seems to have been excessive it at least appears reasonable to hold that Ralph N. Weil's salary was excessive to the extent that it created a loss for the company as indicated by the above figures of deficits. Having this in mind, my conclusion is that Ralph N. Weil drew at least $10,000.00 in salaries in excess of what the directors and officers were reasonably justified in paying him for his services.

"49. That the said sums were withdrawn by said Ralph N. Weil without a fair consideration with intent to hinder,

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Hercules Construction Company was a one man
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withdrawals were not a payment of an admitted
de e withdrawals were a wilful misappropriation of
th s of the Hercules Construction Company of which
R. Weil was an officer and the authorities cited hold
th a misappropriation is not dischargeable in bank-
ru

Tts Were Created by Fraud While Ralph N. Weil as Acting as an Officer:

lebts were also created by fraud while petitioner
wg as an officer of Hercules Construction Company.
Treme Court of Wisconsin held that "Appellant's in-
dss for said sums of $16,800 and $10,000 were lia-

bilities created by his fraud and misappropriation while acting as an officer of Hercules." (R. 204)

Weil's conduct is fraud under Federal Law. *Wardell vs. Union Pacific R. R. Co.*, 103 U. S. 651, 657-8, 26 L. Ed. 509, 511, where the court wrote of the offending directors:

> "Their position was one of great trust and to engage in any matter for their personal advantage, inconsistent with it, was to violate their duty and to commit a fraud upon the Company."

The fundamental equity doctrine is stated in *Moore vs. Crawford*, 9 S. Ct. 447, 448, 32 L. Ed. 878:

> "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

Section 242.07, Wisconsin Statutes, 1945:

> "*Fraud in fact.* Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors."

The Circuit Court found that the transfers in question were made with intent to hinder, delay and defraud the creditors of said Hercules Construction Company. (R. 163, 167)

CONCLUSION.

The Wisconsin Supreme Court has not decided any question of law in a way that is either probably untenable

or in conflict with the weight of authority or with the applicable decisions of this Court. The application presents no meritorious ground for allowance of certiorari, and tenders no question which merits or requires review. This case presents no feature which justifies consideration by this Court, and the petition should be denied.

Respectfully submitted,

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